

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Revocation  
Of the Group Family Day Care  
License of Gloria Lehrer

FINDINGS OF FACT,  
CONCLUSIONS  
AND RECOMMENDATION

The above entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on August 6 and 7, 1990, in the Conference Room of the Steele County Social Service Center, Owatonna, Minnesota.

Scott Schreiner, Assistant Steele County Attorney, 317 North Cedar Avenue, P.O. Box 616, Owatonna, Minnesota 55060, appeared on behalf of Steele County Social Services (the County). Kent D. Rossi, Attorney at law, 330 South Oak, P.O. Box 618, Owatonna, Minnesota 55060, appeared on behalf of the licensee, Gloria Lehrer. The record closed on August 7, 1990, upon adjournment of the hearing and conclusion of oral argument by the parties.

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Ann Wynia, Commissioner, Department of Human Services, 444 Lafayette Road, Saint Paul, Minnesota 55155 to ascertain the procedure for filing exceptions or presenting argument,

STATEMENT OF ISSUE

1. Whether there is substantial evidence that the following alleged incidents occurred.

a That Licensee's husband had sexually abused a day care child several years ago in the day care home.

b - That Licensee's daughter sexually abused a day care child several years ago in the day care home.

2. Whether Licensee had failed to properly supervise day care children several years ago by leaving them in the care of her daughter who was not 18



years old at the time and who allegedly did not supervise the children properly while they were in her care,

Based upon the record herein, the Administrative Law Judge makes the following,

#### FINDINGS OF FACT

1. Licensee provides group family day care at her home at 1050 Robert Place, Owatonna, Minnesota. She and her family moved to that house in November 1979. Licensee has been married for 20 years to Otto M. Lehrer, III. They have two children, age 18, and age 16. Her husband is sometimes referred to as "Big Otto" or "Otto senior", and her son as "I" has now graduated from high school, but still lives at home, at least part-time.

2. Otto Senior is a self-employed auto mechanic and has owned and operated Otto's Auto Repair for four years. Prior to that and back to 1970, he worked with his father at Owatonna Auto Clinic. He has been involved in several activities, particularly with I including Cub Scouts, where he was a Cub Leader and a Cub Master, Boy Scouts, where he was a committee member and a former Eagle Scout himself, and a gun safety training instructor. He was also a member of the Owatonna Jaycees until he went over the maximum age of 35 and is a member of the Knights of Columbus where he has occasionally worked on various projects of the organization. He has been a softball player and coach and a volunteer Little League basketball and baseball coach.

3. When he worked with his father at Owatonna Auto Clinic, Otto Senior was normally at work when the shop was open from 7:30 to 5:00 and often remained there later. For some period of time, he worked Saturday mornings at the clinic. At his own shop, he now goes into work about 6:00 a.m., works until 7:00 or 8:00 p.m. and also works most Saturdays. The shops are located a few minutes from his home. In Licensee's view, Otto Senior is always working or fishing and seldom home.

4. Licensee began providing day care 16 years ago when the person who was babysitting for I then age 2, and her four or five-year-old sister, , had some difficulty with ION\* and was looking for someone else to take care of them. Licensee began babysitting for the two girls and her business grew from there. The girls' parents were divorced and they lived with their mother, who worked two jobs and was gone from home a great deal. Mm and MM essentially became part of the Licensee's family, partly because they were about the same ages as Licensee's children. was the oldest was a year younger, was one year younger than and and was about one year younger than and because of the closeness of their ages, were particularly close and Iowa sometimes felt left out of their activities. The girls often stayed at Licensee's after their day care, either because they wanted to stay and play or because their mother needed them to be babysat for the evening. They occasionally stayed overnight. While the Licensee had several children in her care during the day, the girls would normally be the only additional children in the home when they stayed there late to visit or be babysat. The girls continued going to the Licensee regularly for day care until



was about eight or nine years old and was 10 or 11 years old,  
At that point in time, a woman moved next door to the girls home who was able to provide day care service, and, because of the convenience, the girls started going there. After that, they stayed with Licensee only rarely. Subsequently, they moved out of Owatonna and now live in .

5. Otto Senior had a workshop in his basement that he has recently converted to an office. Prior to that time and at the time the girls stayed at the house for day care, the workshop was a rectangular room with a door near the center of one long wall. Along the wall to the left of the door were some shelves that extended to the far left wall, Along that wall was a white metal cabinet and on the right end of that wall and adjacent to the long wall opposite the door was a workbench. Between the workbench and the white cabinet was a space of 12 to 15 inches where a box of wood scraps was normally kept. Off the end of the workbench toward the white cabinet, a plastic garbage bag was hung from two nails pounded into the end of the workbench. As trash accumulated in the garbage bag, the top would naturally remain in a hanging, open position. Otto Senior never had a garbage can or trash can in his workshop and always used a garbage bag instead. The white cabinet was a metal cabinet, five to five and one-half feet tall, and approximately three feet wide. It had double doors that opened outward with two doors on each side so that there were actually four doors in the cabinet-

6. Originally the workshop had no lock on it because, as Otto Senior explained, the door outside the workshop had a lock. That room was originally used as a storage room, but was later converted to the "pool room" when a pool table was put in there- At about the same time, Otto Senior moved his guns into the workshop from upstairs and added a lock to the workshop door. The workshop was normally kept closed when Otto Senior was not present; although the key was kept above the door out of the reach of the children. Children were not allowed in the workshop when Otto Senior was not there.

7. Otto Senior normally kept some magazines depicting nude women in the workshop. knew they were there and thought the other kids knew that too. She once saw and another boy looking at the magazines in the basement that she assumed they got from the workshop. Otto Senior denies that he ever kept any such magazines in the workshop and testified that when he did have "Playboy-type" magazines in the house, he would keep them in a bedroom dresser drawer unless he happened to have one in the workshop while he was reading it. On April 5, 1990, a search warrant was executed at Licensee's home looking for any magazines depicting nudity, particularly in the workshop. The search revealed three magazines in the back of a filing cabinet in the workshop, or what was by then the office, underneath some other material. The three magazines, all of which pictured nude women and were dated December 1988, were "Penthouse," "Hustler" and "For Adults Only",

8. From about the time was five years old in approximately 1981, until she and her sister stopped going to Licensee's for day care in approximately 1984, Otto Senior, on several occasions, asked to come into the workshop under the guise that he "had a job for her to do." He would then, sometimes while looking at the pictures of the nude women in his magazines, remove his pants and induce to masturbate him until he ejaculated into the trash bag. On one occasion while this was occurring, M came looking for Otto Senior and banged on the locked workshop

door shouting, "Let me in!" Big Otto pulled up his pants pushed \*ON& into the space next to the cabinet, opened its door and hid her behind it. He then dea It with , who left without observing in the workshop. Normally, when Big Otto had ejaculated into the trash container, he would pull up his pants and tell toot not to tell anyone or they would both be in trouble and he would give her some candy. never told anybody about these incidents until early this year.

9, thought that what she was doing was probably wrong, but was not very sure about it at the time. The first time she mentioned it to anyone was early this year when her sister and boyfriend were reading a magazine article about rape and discussing it when was nearby. She then asked if she remembered when Otto Senior did those things to them. assuming that he had required to do the same things was ;cry surprised to hear description of what had happened and was very surprised that it had not happened to . told that she would have to tell their mother about it, but did not want her to because she did not think that it was "that big a deal" and because their mother "always fussed about everything". did tell their mother and the matter was reported to the County on February 21, 1990.

10, Licensee occasionally punished and by pulling or pinching the loose skin under their chins. Licensee admitted that when the children misbehaved she would grasp them by the chin to look them straight into the face to admonish them. The way she described holding her hand is quite consistent with the possibility that it would indeed pull or pinch the skin below the jaw and would certainly be perceived by a child as doing so. Licensee, on more than one occasion, pinched ears to punish her.

11. had reported the incidents involving Licensee's punishment of her to at various times over the years. reported it to their mother once or twice, who told her that there was little she could do since she was not there to see it.

12. As a young child, INN& had mixed feelings about what Otto Senior had required her to do. She somehow knew that it was "wrong," but felt that it was "right" because an adult had asked her to do it. She also was afraid to report it because she was somewhat afraid of Licensee because of what she perceived as the punishment she had received from Licensee. She was also afraid to report it because she had been told that her mother had had difficulty in finding a babysitter for her because she was hard to handle and wouldn't be able to find another babysitter. Today, is angry at herself for not having reported the sexual abuse earlier and angry with Otto Senior for what he made her do. She also still has some anger with Licensee for the punishment she received and appears to have some anger because she and her sister were occasionally required to do some cleaning and other chores at Licensee's home.

13. On one occasion when was 11 or 12 years old, which would have been approximately five years ago, Licensee left the home and left in charge. At some point, RINI[ and were in bedroom with a three- or four-year old boy. took the boy's pants down and fondled his

penis. She was not changing his diapers or anything of that sort, but touched his penis with a sexual intent. also wanted the boy to touch her



breasts and other body parts. There had been other occasions between and when wanted to "play house" or play "mom and dad", where would take off her pants and ask Emily to touch her vagina, which occasionally did

14, was the subject of a sexual abuse investigation approximately three years ago that found the claim unsubstantiated.

15 Effective November 30, 1989, Licensee's license had been placed on probationary status for a period of one year as a result of allegations that she had left a day care child unattended when she went to school to pick up another child. Those complaints were made by a "Big Sister" of one of the day care children named One day, now age 7, returned to Licensee's house from the school bus after school. Big Sister was to pick her up shortly. Licensee got a call that another child needed to be picked up from school- Licensee then decided that she would leave at the house on the front step to wait for the Big Sister while she went to pick up the other child.

16. During the last year or two that the girls went to Licensee for day care, Licensee occasionally left them for short periods under the care of If. At that point in time, would have been 12 or 13 years old. This rarely happened during the daytime while Licensee was providing "day care" but normally happened in the evening when she was "babysitting" for the girls. During the daytime, if Licensee had to leave the home for some short period, she would normally leave an adult relative or acquaintance in charge. In the evening, Licensee would go out with Big Otto or go to play bingo and leave SUMPS& in charge. In most cases, the only other children present would be the girls, but there were occasional times when other day care children were present, as when the incident involving a 3 or 4 year old boy described above occurred. When was in charge, she would just go to her room, often with and would not supervise the other children.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction in this matter pursuant to Minn. Stat. Sec. 14.50 and 245A.08.

2. The County has sufficiently demonstrated that reasonable cause existed to revoke Licensee's group family day care license. Consequently, pursuant to Minn. Stat. 245A.08, subd. 3, the burden of proof has shifted to Licensee to demonstrate by a preponderance of the evidence that she was in full compliance with the rules at issue.

3. Minn. Stat. 245A.07, subd. 3, provides that, "The Commissioner may suspend, revoke, or make probationary if a license holder fails to comply fully with applicable laws or rules." Minn. Stat. 245A.07, subd. 1, requires that, "When applying sanctions, the Commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program."

4 Minn Rule 9502.0335 , subp . 6 , prov i des in relev ant pat t

An app I i cant or prov i der sha I I not be issued a license or the license sha I I be revoked , not renewed , or suspended if the applicant, provider, or any other person living in t he day care residence or present during the hour s children are in care , or working with chiddren i

E Has had a conv i c t ion of , has admitted to, or there is substantial evidence indicating incest (as prohibited in Minnesota Statutes, section 609.365), or physical abuse, sexual abuse, or neglect !as those terms are defined in Minnesota Statutes, section 626.556).

F Has had a conviction of , has admitted to, or there is a preponderance of the evidence indicating the commission of any crime listed in Minnesota Statutes, chapter 152 and sections 609.18 to 609.21 or 609.221 to 609.378, 609.556 to 609.563, 609.66 to 609.675, 617.23 or 617.246, other than those listed in item D (sic). Conviction, admission, or a preponderance of evidence indicating the commission of a same or similar crime in another state or national jurisdiction shall also be grounds for license denial, revocation, non-renewal or suspension.

5. Minn Stat 626.556, subd. 2(a) provides, in relevant pat t i

"Sexual abuse" means the subjection by a person responsible for the child's care, or by a person in a position of authority, as defined in section 609.341 , subdivision 10, to any act which constitutes a violation of section 609.342, 609.343, 609.344 or 609.345.

Under b, Minn. Stat. 626.556, subd. 2(b), a "person responsible for the chi Id' s care" includes an individual functioning outside the fami ly unit and having responsibilities for the care of the child such as a teacher, school administrator, or other lawful custodian of a child having either full-time or short-term care responsibilities including, but not limited to, day care, babysitting whether paid or unpaid, counseling, teaching, and coaching. Minn, Stat. sec 609.341, subd. 10, defines "position of authority" as including but not limited to any person who is a parent or acting in the place of a parent and charged with any of the parent's rights, duties or responsibilities to a child, or a person who is charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no

matter how brief, at the time of the act.

Minn Stat 609 343, subd. 1, states in relevant part:

A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exist:

(a) The complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced.

Minn. Stat 609,341, subd. 11, provides in relevant part

"Sexual contact," for the purposes of sections 609.343, subdivisions 1(a) to (f), . . . includes any of the following acts committed without the complainant's consent, except in those cases where consent is not a defense, and committed with sexual or aggressive intent:

(i) the intentional touching by the actor of the complainant's intimate parts, or

(II) the touching by the complainant of the actor's, the complainant's, or another's intimate parts effected by coercion or the use of a position of authority, or by inducement if the complainant is under 13 years of age or mentally impaired

6. Otto Senior is a person living in the day care residence and substantial evidence indicates that he engaged in sexual abuse upon from approximately 1981 to 1984. Such acts constitute grounds for revocation or other sanction under Minn. Rule 9502.0335, subp. 6E.

7. is a person still living in the day care residence at least occasionally and substantial evidence indicates that she has engaged in sexual abuse upon a 3 or 4 year old child in the day care residence in approximately 1984. Such act constitutes grounds for revocation or other sanction under Minn. Rule 9502.0335. subp. 6E.

8. Minn Rule 9502.0365, subp. 5 provides as follows:

A licensed provider must be the primary provider of care in the residence. Children in care must be supervised by a caregiver. The use of a substitute care giver must be limited to a cumulative total of not more than 30 days in any twelve month period.

Under Minn. Rule 9502.0365, subp. 4, a helper may be used in place of a second adult care giver when there is no more than one Infant or toddler present

Minn. Rule 9502 0315, subp. 29(a) states:

"Supervision" means a care giver being within sight or hearing of an infant, toddler, or preschooler at all time; so that the care giver is capable of intervening to protect the health and safety of the child. For the school-aged child, it means a care giver being available for assistance in care so that the child's health and safety is protected

Minn. Rule 9502 0315, subp. 60 states:

"caregiver" means the provider, substitute, helper, or another adult giving care in the residence Under subp 29 of the rule, a "substitute" is a person at least 18 years of age who assumes the responsibility of the provider and, under subp. 14 of the rule, "helper" means a person at least 13 years of age and less than 18 years of age who assists the provider with the care of children.

9. The definitions of supervision, caregiver and helper cited above do not permit a person under 18 years of age to act alone as a caregiver providing supervision of day care children A person under the age of 18 may be a "helper ," but only if they are assisting the provider with the care A

"helper" cannot, by definition, act alone to provide care

10. During approximately 1984 and 1985, Licensee occasionally left day care children in the care of her daughter, who was not yet 18 years old at the time As such, the day care children were left without the supervision of a caregiver in violation of Minn. Rule 9502.0365, subp. 5

11. Licensee failed to prove by a preponderance of the evidence that she was in full compliance with the rules set forth above.

12. Given the nature and severity of the sexual abuse in this case, revocation of Licensee's license is appropriate.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following

#### RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Group Family Day Care License of Gloria Lehrer be revoked

Dated this 6th day of September, 1990.

STEVE M. MIHALCHICK  
Administrative Law Judge



# NOTICE

Pursuant to Minn Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail

Reported: Taped, not transcribed.

Tape numbers 91 42 , 9149 , 91 81 , 91 51 and 91 53

## MEMORANDUM

A significant issue in this case is to determine who in telling the truth and or and Actually, with regard to the sexual abuse violations, the question becomes whether the record contains substantial evidence that the sexual abuse occurred and the burden of persuasion on the issue is upon the Licensee. The allegations by tomb and c I ear I y provi de r easonable c au se for the County and the Commiss I one r to

propose the revocation of the license. Therefore, under Minn. Stat. 245A.08, subd. 3, the burden has shifted to the Licensee to demonstrate by a preponderance of the evidence that she was in full compliance with the laws and rules the Commissioner alleges have been violated. This shifting burden of proof was upheld against a challenge that it violates licensees' due process rights in In the Matter of the Family Day Care License of Judith Cullen, unpublished opinion, Court File C4-88-2609 (Minn App. July 18, 1989),

Conviction of, admission to or "substantial evidence of" sexual abuse of a minor and similar acts is specified by Minn. Rule 9502.0335, subp. 6 as a disqualification factor requiring revocation or suspensor. By way of comparison, conviction of, admission of or a "preponderance of the evidence" indicating the commission of other crimes is necessary to impose a sanction in canes involving those other crimes. Given the greater abhorrence of sexual abuse of minors and similar acts, it is clear that "substantial evidence" means something less than "a preponderance of the evidence." The Administrative Law Judge has found no case specifically defining the term "substantial evidence" as used in the day care rules. In a 1984 rule hearing procedure concerning certain amendments to the rules, Administrative Law Judge

George Beck discussed the definitions of the term. In the Matter of the Proposed Adoption of Department, of Human Service's Rules Governing Licensing Standards for Family Day Care Homes, Minnesota Rules Parts 9545.0315 - 9545.0445, Report of the Administrative Law Judge, January 22, 1984, Findings 38a - 38f. The Department had noted at the time that "substantial evidence" had proved difficult to interpret and was generally intended as a standard of review upon appeal and not a standard of proof at the hearing level, Judge Beck pointed out that substantial evidence is most commonly thought of as a standard of appellate review and is thought of as evidence that affords a substantial basis of fact from which the fact in issue can be reasonably inferred. It is something more than a "mere scintilla," but less than the weight of the evidence. At any rate, the confusion still has not been cleared

up. For purposes of this matter, the Administrative law Judge concludes that "substantial evidence" means just what the words say, that is, sufficient



credible evidence to create the impression that the alleged act or acts quite

like I y occurred, but a degree of evidence somewhat less than a preponderance

In this particular matter, the question may be moot, for the Administrative Law Judge believed that although the facts as set forth in the Findings have been proved by a preponderance of the evidence even though the burden was not upon the County to do so

and testified credibly. testimony about Otto Senior's sexual abuse of her was believable. Her description of the workshop was quite accurate and contained only minor, understandable differences from Otto Senior's description of it. They are understandable in light of the fact that the acts occurred over six years ago and at a time when she was between 6 and 8 years old, She described a trash can instead of a garbage bag and she described the metal cabinet as being located somewhat differently than Otto Senior did, However, his description of its location was actually more consistent than hers with the possibility of him pushing her away from the garbage bag and behind the cabinet door. She described the presence of the magazines with nude women in the workshop, which was corroborated by testimony and the recent search of the workshop showing he is still hiding such magazines there. Some of the responses made under cross-examination also indicate that she was testifying from her memory and not her imagination. When asked how she knew what the magazines contained, she simply stated that she could see them because she was standing next to Otto Senior at the time. The most troubling aspect of testimony was the anger she still had for Licensee because of the chores the girls were required to do and because of the punishment she received from Licensee, The Licensee did pull her neck and pinch her ears, confirmed that. But also described an incident when they were in the old house, which would have been at least 10 years ago, when she was no more than four years old. had cut her hair. reported the incident to Licensee who got mad at her for lying about, washed out her mouth with soap and water, filled the sink upstairs in the old house, and stuck head under the water She described incidents in which Licensee pushed her own fingernails underneath, causing considerable pain and sometimes bleeding, and other incidents where Licensee pulled her hair. She also described one incident in which Licensee, apparently while seated, put her foot on foot and punched her in the stomach a number of times. Licensee denies that any of these incidents, except for holding the children by their chin, ever occurred. It

is unclear whether these other incidents occurred. They probably occurred in some form that has been magnified by young age at the time and the passage of time, but is impossible to say for sure. Despite the concerns these matters raise, her allegations about Otto Senior were very credible.

-MEMO# was even more credible, there was absolutely no hint that anything she said was even mildly exaggerated. Moreover, her testimony about genuine surprise upon learning that Otto Senior had not also sexually abused her further reinforced testimony. In light of all the testimony in the record, and were more believable than Otto Senior and.

SMM